PROVINCE OF QUEBEC,
DISTRICT OF MONTREAL.

In re: TRANCHEMONTAGNE,
" St. LOUIS, and others,

INSOLVENTS.

FACTS.

Divers parties to promissory notes and bills receivable, having failed, the Banks, the owners of those bills, with the alleged intention of saving their recourse against each of them, refuse to sign a deed of composition with one, say the maker—unless the assignee of the indorsers, do intervene and agree to let the Banks rank likewise on the estates of the indorsers, in the same manner as if no composition had been accepted.

QUESTIONS

1o Has the assignee sufficient authority to consent to such a reservation in favor of the Banks?

2o Is any such consent necessary, in other words: are the indorsers discharged by the composition with the makers?

3o Are the holders entitled to rank on each estate for the full amount of the notes, or only for the balance remaining uncovered by former dividends or composition?

I

Upon the first question, I have no hesitation in saying that under no circumstances, an assignee will be justifiable in signing any deed which might seriously impair the interests of the creditors. Under the Insolvent Act of 1864, the assignee has no other authority but that which has been expressly given to him by the Act, or by the creditors. All powers vested in the insolvent, which he might legally execute for his own benefit, may be

executed by the assignee, sect. 4, p. 7; but it is clear that the insolvent has no right to compromise with one of his creditors, unless he has obtained the consent of them all; and the assignee has no greater authority. Before signing such a deed of composition as the one framed by the Banks in these cases of Tranchemontagne, St. Louis, &c., the assignee is bound to receive instructions from the creditors of the indorsers, and to call a meeting to that effect, by leaving at the post or otherwise with each creditor for over $100, a notice in writing stating the object of such meeting (sect. 4, p. 3); for this section does not require that meetings of creditors, for the purpose of receiving instructions, should be called by advertisement; and section 11 applies only to notices of meetings *required to be given by advertisement, without special designation of the object of such meeting.*

Of course no such instructions can regularly be obtained until the expiration of the two months given to fyle claims and ascertain the number of the creditors. In fact, a deed of composition or discharge can not effectually be used before that time.

However, if the assignee is fully acquainted with the creditors and can rely upon a confirmation after the two months, I do not see any inconvenience in acting in conformity with instructions unanimously given by the creditors before the expiration of the two months.

II

But can the Banks compose with the makers or endorsers primarily liable without the consent of the other parties to the notes, to save their legal remedy against them. In former times, this important question was very unsettled. Some jurists, like Savary, (Parère 13 et 48) were of opinion that a creditor was bound to make a choice between the estates of his debtors, and that by accepting one of them, he was barred from ranking on the others, under any circumstances. But according to Dupuy de la Serra, that rule must be limited only to compositions accepted without the consent of the other debtors. " En cas de faillite," he says, " de tous les obligés à la lettre de change acceptée et protestée faute de payement, comme le porteur a une action solidaire contre tous, il a droit d'entrer dans chaque direction et contribution, sans pouvoir être obligé d'en choisir ou opter et abandonner les autres. Le porteur....., s'il signe le contrat d'un des obligés, sans réserves, se rend non recevable contre les autres.—

Le porteur....., qui signe le contrat d'un des premiers obligés, sans avoir un consentement des derniers obligés, que c'est sans pré judice à son action, se rend non recevable contre eux faute de leur pouvoir céder l'action entière." These principles were undoubledly maintained by the majority of commentators and by the old french courts, and unquestionably form part of the common law of this country (Arrêt du Parlement de Paris, 18th May 1706; Bornier, Boutaric and Jousse sur l'art. 12, tit. 5, de l'Ordonnance de 1673; Pothier, Contrat de Change, No. 179.) Therefore, *if a composition is made under the common law, no assignment having been made under the Insolvent Act of* 1864, the Banks certainly have the right to require the consent of the assignee of the endorsers to the deed of composition of the makers or otheir parties liable to them; and such was the practice prevailing here before the Insolvent Act, which practice seems to be resorted to, even under our Bankrupt system.

However *as to composition made under the Insolvent Act*, that formality or condition has been done away with. Section 9, p. 4, says: " A discharge under this Act *shall not operate any change in the* " *liability of any person or company secondarily liable for the debts of* " *the insolvent, either as drawer or endorser of negiotiable paper*, or " as guarantor, surety or otherwise, nor of any partner or other " person liable jointly or severally with the insolvent for any " debt."

Under this express clause of the statute, there is no doubt that the necessity of getting the consent of the indorsers to the composition of the makers or other parties primarily liable, whether insolvent or not, is no longer necessary, a deed of composition having *the same effect as an ordinary discharge*, (sect. 9, p. 1.)

I say that the indorser is still liable, *whether insolvent* or not, for the Act makes no distinction. If he is not satisfied with the terms of the composition, he may intervene on payment of the claim to the creditor.

In France, England and the United States, the same rule has been laid down under similar enactments. Article 545 of the French Code de Commerce, says: " Nonobstant le concordat, les " créanciers conservent leur action pour la totalité de leur créance " contre les co-obligés du failli."

" Cet article," says Renouard, Traité des Faillites, vol. 2, p. 189, " rend clairement la pensée de la loi, qui a voulu conserver aux " créanciers, en cas de concordat, tous les droits contre les co- " obligés du failli, sans faire aucune distinction entre les créan- " ciers qui ont consenti expressément au concordat, *ceux qui ne*

" *l'ont adopté que par acquiescement tacite, et enfin ceux qui y ont été* " *soumis, contre leur vœu et leur vote, par la volonté de la majorité.*" And according to Namur in his *Cours de Droit Commercial*, published in 1866, the reason of this provision is that " la remise " accordée par concordat est imposée aux créanciers par la néces- " sité, plutôt que consentie par esprit de libéralité. C'est pourquoi " elle n'est pas réputée volontaire et, par suite, ne profitent point " aux co-débiteurs ni aux cautions du failli, lesquels continuent à être obligés comme auparavant" (vol. 2, p. 504.)

Under the English Act of 1861, the same principle prevails. " By section 163," Mr. Griffith says in his recent work on *The Law* " *and Practice in Bankruptcy* (1867), " the order of discharge shall not " release or discharge any person who was a partner with the " bankrupt at the time of the bankruptcy, *or was jointly bound, or* " *had made any joint contract with him.*" The same commentator adds that this is the same as an enactment in the earlier acts.

The United States Bankrupt law of 1867, framed, like our own Insolvent Act, upon the broad principles of the english statutes, declares that " no discharge granted under this Act shall release, " discharge or affect any person liable for the same debt for or " with the bankrupt, either as partner, joint contractor, indorser, " surety, or otherwise " (sect. 33); see Avery & Hoobs on the Bankrupt Law of the United States, p. 229, 230, 231, published in January 1868, and Edwin James on the same, p. 125, published in April 1867.

It appears that the principle in question is not only one of statutory law, introduced by every commercial country, but is even admitted by the common law of England. So in Browne v. Carr, 7 Bing. 508, it was held that a surety is not discharged by reason of the creditors signing an assent to the discharge of the principal; see Ingliss v. Macdougal, 1 Moore 196; Sigourney v. Williams, 1 Gray 623; Gates v. Gash, 5 Cush, 613; Bond v. Gardiner, 4 Binn, 269; Taylor v. Mills, 2 Cowp. 525. Therefore there is no doubt that the Banks do not require the consent of the assignees of the indorsers to accept a composition from the makers or other parties primarily liable, and that notwithstanding such composition, made under the Act, the indorsers still remain liable.

III

The Act says that a discharge shall not operate *any change in the liability of any indorser*, etc. But has the creditor the right to rank

upon the estates of the insolvent indorsers for the full amount of the notes, without deducting the dividend paid under the composition or the estate of the insolvent makers? Is he entitled to claim for only the balance remaining unpaid or unsettled?

Under the express provisions of the French Code, art. 542 and 545 the creditor is in all cases entitled *de figurer pour la valeur nominale de son titre.* "Le législateur," says Namur, Droit Commercial, p. 52, "en cas de faillite, a rejeté le principe suivant lequel "un paiement partiel fait par un débiteur solidaire, libère les autres "débiteurs jusqu'à due concurrence. Il a considéré que l'appli "cation rigoureuse de cette règle empêcherait toujours le créan- "cier de recevoir un paiement intégral, quelque fut le nombre des "débiteurs faillis."

The English and American Bankrupt Laws seem to have no precise provisions upon this point; but the rule is stated to be like that in France: "The holder of a bill of exchange or promissory note," says Mr. James, of many years experience in the English courts of bankruptcy, at present a distinguished lawyer in New York, "may "prove under the estate of as many drawers, acceptors, or indor- "sers as are bankrupt, and may bring actions against other parties "on the security, and may receive a dividend *upon his whole debt* "*from each of estates under which he has proved*, ex parte Dyer, "6 Vesey, 9; exparte Adam, 2 Rose, 36; ex parte Bank of Scotland "2 Rose 197, ex parte Wildman, 1 Atk, 109; but he can not receive "more than the amount of such bill or note." (Bankrupt Law, 1867, p. 81.) "The holder of a bill of exchange," say Messrs. Avery & Hobbs "may prove the same in bankruptcy against the "drawer, the acceptor, and the payee, *and receive dividends from all the estates until his debt is paid.* In re Babcock, 3 Story, 393." Bankrupt Law of the U. S., p. 136.

Likewise, Mr. Griffith in his *Law and Pratice in Bankruptcy*, vol. 1, p. 608 says: "As at law, the holder of bill may, upon due "notice of dishonour, sue concurrently and recover judgment for "the full amount and levy execution from every party to the bill "till he have recovered the bill sum due on the bill; so in bank- "ruptcy he may prove against every party, if they are all bank- "rupts, or prove against those of them who are bankrupts, and "bring actions against the others, provided that in the whole he "do not receive more than 20s. in the pound on the whole "amount of the bill; but if any part of a bill have been received "by the holder, before he has actually proved it upon the estate "of a party, he can prove only for the residue; and where a bill "has been proved or claimed on another estate, and a dividend

" reserved on such proof or claim, such dividend, thought not " paid, must be deducted."

Under the old french law, which is the common law of Lower Canada, the opinions were very much divided Dupuy de Serra, c. 16, holds as a maxim that " le porteur d'une lettre de change " acceptée et protestée faute de payement, qui est entré dans quel- " que contribution, *ne peut entrer dans les suivantes que successive-* " *ment pour ce qui lui est dû en reste.*" This opinion is also entertained by Pothier, Boutaric and Jousse, and has been confirmed by *arrêt du parlement de Paris*, of the 18th May 1706. All the modern commentators however have rejected that doctrine as contrary to the true principles of commercial law. " Cette restriction," says Massé, Droit Commercial, vol. 3, p. 515 était en opposition avec les principes de la solidarité, qui veulent que le créancier ne puisse être contraint de diviser la dette entre les codébiteurs, et qu'il ait au contraire le droit de demander à tous la totalité. Qu'après une division volontaire, le créancier ne puisse agir contre les autres débiteurs que sous la déduction de ce qu'il a reçu, on le comprend ; mais la division forcée, qui résulte d'un concordat, ne peut être opposée au créancier qui agit contre plusieurs débiteurs faillis, parceque tous les faillis étant débiteurs de la totalité, c'est la totalité de la dette, et non la dette réduite qui doit figurer à leur passif et dans leur concordat."

The principle supported by de la Serra, Pothier and others was overruled by later decisions. Nicodème, in his *Exercice des commerçants Parère*, 6, *p* 358, reports the opinions of six jurists or merchants of that time, strongly urging the contrary view—which finally was adopted by the Parlements, even by the Parlement of Paris (arrêt of the 18th June 1776 ; arrêt du Conseil of the 24th February 1778, 23rd October 1781.) These *arrêts* were considered as settling the jurisprudence in France, according to which the holder of a promissary note may rank on the estates of all the parties to the same, for the full amount mentioned on the paper, without deducting previous dividends.

Let us now say one word of the provisions of our Insolvent Act of 1864 upon this important point.

Section 5, p. 2 enacts as follows : " All debts debts due and paya- " ble by the insolvent at the time of the execution of a deed of " assignment, or at the time of the issue of a writ of attachment " under this act,..... shall have the right to rank upon the estate " of the insolvent." The recourse of holders of promissory notes at the time of the assignment being complete and perfect as to all parties and each of them, and for the full amount, it seems

that they are entitled to rank upon the estate of each insolvent, for the total sum indicated by the paper, whatever part payment might take place in bankruptcy; for the Act admits the proof of debts, not as they will stand some days or some months after insolvency — after declaration of dividends — but as they existed *at the time of the assignment.* (See also exparte Coplestone, 3 Dea. 546; Exparte Wildman, 1 Atk. 109).

Section 9, p. 4, already quoted, fully confirms this view. It enacts that a discharge or composition under the act *will not operate any change in the liability of any indorser, etc.* Therefore, after, as before, the composition, he is still liable for the full amount of the note, and the creditor has the right to rank for the same.

An objection however is made upon the latter part of section 5, p. 6, which, after enacting " that every item of a claim shall rank, ' *until such item of claim be paid in full,*" says : " but no claim or part " *of* claim shall be permitted to be ranked upon more than once, " whether the claim so to rank be made by the same person or by " different persons."

It seems to me that this *proviso* has no application to the case of several estates ; it only means that when once a claimant has drawn a dividend from the estate, he cannot be allowed to rank a second time upon the same estate and for the same dividend. In face of sections 5 and 9 already quoted, the *proviso* in question cannot affect a claim severally made against divers insolvents—such as makers and indorsers of promissory notes—These claims, therefore, remain governed by the rules laid down in those sections, which must be considered as settling the old french jurisprudence in force in this country.

A deed of composition, agreed to by the duly authorized assignee of the insolvent indorsers, containing, on behalf of the Banks, an express reservation of their remedy against them for the bill sum of the notes, would indeed give them the right to rank for their full claim ; for then there would be an express agreement from the creditors of the insolvent Indorsers, stronger than any law to the contrary ; but under the present state of our Bankrupt Laws, this precaution is no longer required.

It should be borne in mind that the effect of a composition from the makers of a note, would seem to be different, if the indorser, no then an insolvent, should subsequently become a bankrupt. Suppose A, maker of a note endorsed by B, fails, and offers a composition of 10s. in the pound, which is accepted by the holder C. Likewise B fails afterwards. C, being a creditor only for one half of the note *at the time of the assignment*

by B, would be entitled to rank, not for the full amount of the note, but only for one half thereof (sect, 5, par, 1). This is strictly in accordance with the rule laid down by Mr Griffith, when the learned jurist says that *if any part of the bill has been received by the holder, before he has actually proved it upon the estate of a party, he can prove only for the residue.* It would therefore seem advisable that, in all cases, the holder should fyle his claim against the indorser, before receiving a dividend, or agreeing to a composition with the maker or other parties primiraly liable. (See Cooper o, Pepys, 1 Atk. 107; ex parte Kennedy 7 Ir. Ch. 285; ex parte Taylor 1 De G & J 302; 3 Jurist N. S. 753; ex parte London Joint Stock Bank, 28 L. T. 375.)

IV

Upon the whole, I am of opinion :—

1stly That, in order to effect a composition with the makers of promissory notes or other parties primirely liable, the assignee of the insolvent indorsers has no power, under the Insolvent Act of 1864, to consent to such composition.

2ndly. That in such a case, the assignee requires positive instructions from the creditors.

3rdly That a composition, made at common law without the consent of the indorsers, operates as a discharge to them.

4thly. That under the Insolvent Act of 1864, such consent is not necessary, a composition or discharge, made under the Act, not making any change in the liability of the indorsers or other parties secondarily liable, whether insolvent or not.

5thly. That in contribution or preparation of dividends, holders of promissory notes have the right to rank upon the estates of the makers and indorsers, and each of them, for the bill sum, until wholly paid, notwithstanding any previous compositions or dividends.

Montreal 23rd March 1868.

D. GIROUARD,
Advocate